Guardians of the Constitution: Unconstitutional Constitutional Norms

Definitve version is published as Rory O'Connell, "Guardians of the Constitution: Unconstitutional Constitutional Norms" (1999) 4 *Journal of Civil Liberties* 48-75

Guardians of the Constitution: Unconstitutional Constitutional Norms[1]

The recent adoption of the UK Human Rights Bill offers the possibility for many developments in the UK legal system.[2] At the centre of the change stand the new system for the protection of civil rights, and the re-drawn relations between the judiciary and the other branches of Government; combined these features raise the spectre of judicial activism. The Human Rights Act appears to resolve the division of responsibilities between the judges and the political branches in a manner which is deferential to the traditional notions of parliamentary sovereignty, following the example of New Zealand.[3] However such textual confines are potentially treacherous if a court's conception of civil rights and constitutionalism leads it to embrace an activist approach. This article explores three foreign examples of judicial activism straining at the textual limits.

Judicial activism in modern democracies is an important issue - as Bhagwati C.J. of India notes:

> "It can hardly be disputed that judicial activism is now a central feature of every political system that vests adjudicatory power in a free and independent judiciary."[4]

---

[1] Written by Rory O'Connell, Ph.D. (European University Institute, Florence). Lecturer, University of Lancaster (UK). Email: r.oconnell@lancaster.ac.uk My very sincere thanks to Prof. Luis Diez-Picazo, and the members of Prof. Diez-Picazo's class on Comparative Constitutional Law at the European University Institute in Florence, most especially Heike Gading and Andrew Butler. I am also very grateful to this Journal's editor and anonymous reviewer for their constructive comments. All inadequacies remaining in this paper are my own.

[2] See generally: Lord Irvine of Lairg, "The Development of Human Rights in Britain under an Incorporated Convention on Human Rights" (1998) *Public Law* 221, 228-9; Markesinis, B.S. *The Impact of the Bill of Rights on English law*. (Oxford: O.U.P., 1998); Zander, *A Bill of rights?* (London: Sweet & Maxwell, 1997); K. Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) MLR 79.

[3] Sections 3, and 4 of the Human Rights Act 1998 recognise only a power of interpretation, and a power to issue a non-binding declaration of incompatibility, thus creating one of the mildest forms of constitutional justice in the democratic world. For discussion of this "New Zealand" model, see M. Taggart, "Tugging on Superman's Cape: Lessons from experience with the New Zealand Bill of Rights Act 1990" (1998) *Public Law* 266; A. Butler, "The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a bad model for Britain" (1997) 17 *Ox. J. L. S.* 323.

[4] Bhagwati, "Judicial Activism and Public Interest Litigation" 23 *Col. J. Trans.* L. 561, (1985).

See recent symposia on the topic in: Vol. 19 (1990) *Policy Studies* Journal; Vol. 26 (1994) *Comparative Political Studies*; Vol. 15 (1992) *West European Politics;* Vol. 60 (1997) *Modern Law* Review. See also Beatty, ed. *Human Rights and Judicial Review* (Dordrecht: Kluwer, 1994); C. Landfried, ed., *Constitutional Review and Legislation*, (Nomos, Baden-Baden, 1988); M. Volcansek, ed. *Judicial Politics and Policy-Making*, (London: Frank Cass, 1992); B. Van Roermund, *Constitutional Review: Theoretical and Comparative Perspectives* (Deventer: Kluwer, 1995); Tate, et al, *The Global Expansion of Judicial Power* (New York: NY Uni. Press, 1995).

Judicial activism is liable to become particularly controversial and crucial where judges are given powers to protect civil rights in a constitutional system.[5] Judicial activism in the cause of protecting civil rights poses the paradox of constitutional justice. Protecting the civil rights of life, liberty, privacy, expression, and so on may collide with the exercise of the rights of political participation. The rights protected by the new Human Rights Act include both types of rights.[6] This clash between the rights of the ancients and the rights of the moderns is one of the great issues of modern political theory.[7]

Activism can take many forms, as Bhagwati notes, and this article examines perhaps the most extreme form - the power claimed by some judges to review the constitutionality of purported amendments to constitutions.

Given their enormous powers, it is right that the activities of judges should be open to public debate and scrutiny. The media, politicians, the public, are right to be worried about whether judges follow the law or something else, whether some judges are too soft on rapists, or too lenient with landlords. However public debate often fails to make some distinctions about the type of judgements that can be passed on judges:

---

[5] Of course similar questions can arise even where States avoid written constitutions and fully fledged institutions of constitutional justice: See, in the UK, *Liversidge v. Anderson*, [1942] A.C. 206, *Anisminic v. Foreign Compensation Commission*, [1969] 2 A.C. 147; in New Zealand, see *Baigent v. Attorney General and Others*, unrep. 29/7/94, Court of Appeal; in Israel, see *Filming Studio in Israel Ltd v. Gerri*, (1962) 16 P.D. 2407; *Katalan v. Prison Authority*, (1980) 34 (III) P.D. 294. For analysis of the Israeli case see: Zamir and Zysblat, *Public Law in Israel*,(Oxford: Clarendon Press, 1996); for a less optimistic view: D. Sharfman, *Living without a Constitution*, (New York: ME Sharpe, 1993).

[6] See the rights protected in Arts. 2 - 12, and 14 of the Convention and Art. 3, Protocol No. 1's guarantee of free elections. This latter provision is now part of UK law: Human Rights Act 1998, sect. 1 b).

[7] The writings of Habermas and Rawls are replete with references to this tension. See Habermas, *Between Facts and Norms*, (Oxford: Polity Press, 1997) Chapter Three, and note his reference to Michelman, "Law's Republic", 97 *Yale Law J.* 1499. Habermas sees Kant and Rousseau as the two classic exponents of these two views, p. 100 - 104.

Rawls sees his theory of justice as fairness as an attempt to adjudicate between two different democratic traditions: the liberty of the ancients, associated with Rousseau, and the liberties of the moderns associated with Locke: *Political Liberalism*, (New York: Columbia Uni. Pr., 1993) p. 4 - 6. See the exchange between Habermas and Rawls in (1995) 92 *J. Phil.* 109.

See also S. Benhabib, *Situating the Self*, (Cambridge: Polity Press, 1992) Ch. 3 "Models of Public Space", where she discusses three conceptions of public space: Arendt's, liberal (citing Ackerman) and Habermas'.

For perceptive criticisms of the power of constitutional justice see: Dahrendorf, "A Confusion of Powers: Politics and the Rule of Law" 40 (1977) *Mod. L. Rev.* 1; Walzer, "Philosophy and Democracy" (1981) *Political Theory* 379; Waldron, "A Rights Based Critique of Constitutional Rights" 13 (1993) *Ox. J. Leg. St.* 18.

- 1. Is the judge faithful or unfaithful to law? Does the judge make a genuine effort to apply the law (no matter how surprising her conclusions may be)?

- 2. Is the judge traditional or progressive? Does the judge attach greater or lesser importance to the conventional understandings of legal method?[8]

- 3. Is the judge (in a political sense) conservative, liberal, centrist, eclectic? (A judge, like anyone, may be all of these, on different topics).

- 4. Does the judge have an activist or passivist conception of the legal role? (A judge may be activist in some areas, like procedure or remedies, and passive in others, such as interpreting the substantive law).

- 5. Which technique of interpretation does a judge use and why? (Semantic, historical, systematic (harmonious or coherentist), teleological (purposive), pragmatic, etc.) Again a judge may use a mixture in different areas.

(A judge may have any mixture of these characteristics; that is one may be liberal, traditional, passive or conservative, activist, progressive.[9])

The fifth point, which technique of interpretation should be used, is the crucial one. The problems are particularly acute in the area of constitutional law, where problems of interpretation intersect with problems of political morality (this applies even in countries without a written constitution). These questions often arise because the constitution refers to vague moral or political concepts and then leaves it to judges to decide what such terms as "judicial independence" or "right to free expression" mean. Judges must often turn to principles of systematic and teleological interpretation to provide a concrete interpretation of the text.[10] That is they must provide a reading of the text which provides a coherent interpretation of all of its provisions, and which promotes the central values of the constitution. Using similar phrases,

---

[8] See Antieau, *Adjudicating Constitutional Issues*, (London: Oceana, 1985) Ch. 4, "Approaches to Constitutional Adjudication".

[9] For instance, in the German Abortion decision, 39 BVerfGE 1, the Federal Constitutional Court rejected an attempt to loosen abortion laws in that country. In *Roe v. Wade*, the US Supreme Court greatly reduced the restrictions on abortion 410 U.S. 113, (1973). Both courts were accused of being activist. See Wallach, "Judicial Activism in Germany" in Holland ed., *Judicial Activism in a Comparative Perspective* (MacMillan: Hampshire, 1991).

[10] Antieau discusses what he calls the liberal / progressive / purposive approaches, and illustrates with judicial comments from Germany, India, and Ireland, as well as Burma, the United States, Australia, Canada. See *Adjudicating Constitutional Issues*, 53 - 61.

German and Irish judges have insisted that "An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions."[11] But courts must not simply harmonise those provisions, they must aim to realise their purpose, and more particularly the central purposes of the Constitution.[12] German, Irish and Indian judges all refer constantly to open-ended but powerful concepts such as the central values of the "free democratic order" and "human dignity",[13] "dignity and freedom of the individual" a "just social order".[14]

This coherentist, value-laden approach to interpretation also seems to be mandated by the European Convention on Human Rights (particularly its Preamble) and presumably the 1998 Human Rights Act. As British judges will be called upon to apply similarly open-ended terms, it is important to realise the extremes to which their interpretation can lead.

In developing such interpretative theories, judges often stress the central position of fundamental rights. Sometimes they emphasise in different ways, that rights are in some sense prior to political society. In any event rights, and other principles of democratic states (separation of powers, elections) are identified as the ultimate point of the basic law. Using these techniques judges may give concrete meaning to vague concepts. Yet these interpretative principles of coherence and effectuation of central provisions, may catapult the judge from the role of deciding the constitutionality of statutes to determining the legitimacy of the basic law itself. The people's guardian of the Constitution against politicians, may turn into a guardian of the Constitution against all comers.

This may happen if a constitutional amendment is proposed which makes no sense in any coherent interpretation of a Constitution which centres on certain values, such as antecedently existent human rights. If an amendment cannot be treated as a coherent part of a constitution which defends certain values, then what are judges to do? The attitude of German, Irish and Indian judges, speaking judicially and extra-judicially, as regards the topic of unconstitutional constitutional norms is the concern of this paper.

---

[11] The *Southwest State Case*, 1 BVerfGE 14, 32, (1951) (see Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, p. 63). See Henchy J. in *State (DPP)* v. *Shaw*, [1982] I.R. 384, 426 "No single constitutional provision (particularly one designed to safeguard personal liberty or the social order) may be isolated and construed with undeviating literalness."

[12] See Justice Gerhard Leibholz (ex of the Federal Constitutional Court), *Politics and Law*, (Leyden, Sithoff, 1965), p. 289; see Costello J. in *Att. Gen*. v. *Paperlink*, [1984] I.L.R.M. 477 and *Murray* v. *Ireland*, [1985] I.R. 522.

[13] Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, p. 47.

[14] *State (Quinn) v. Ryan*, [1965] I.R. 70, 123; *Kennedy* v. *Ireland*, [1988] I.L.R.M. 572; *O'Donoghue* v. *Ministers for Health and Education, Ireland and the Attorney General*, [1996] 2 I.R. 20.

In approaching the topic of unconstitutional norms some factors must be considered. All three Constitutions authorise the judiciary to review the constitutionality of ordinary statutes, and so the role of the courts as watchdogs over the legislator is not in dispute. Their role as watchdogs over the amending power depends on a number of other factors:

- First, what is the amending procedure provided in the Constitution?
- Second, does the constitution explicitly state that some constitutional provisions are entrenched and cannot be removed or altered by amendment? Or make some provisions more difficult to amend?[15]
- Third, is there express provision for amendments to be subject to judicial review, to test their procedural propriety, or their substantive consistency with the Constitution?
- Fourth, does the constitution explicitly state that some provisions are hierarchically superior to others? Is it implicit in the constitution, as interpreted by judges? Indeed, does the Constitution, properly interpreted recognise the possibility of rights which have a status superior to positive law? Some Irish, Indian and German judges have suggested that fundamental rights are only *recognised* by the constitution; their normative force rests on a supra-constitutional morality.

Bound up in all of this is the central question in law: what is the role of interpretation when judges are faced with the open-ended and portentous language of human rights instruments?

When discussing each country, this article offers a few words on its constitutional structure, looking briefly at the procedure of adoption and amendment, and referring to those provisions on which the doctrine of unconstitutional constitutional norms rests. It then analyses the cases where the tension between judicially protected civil rights and the democratic process expresses itself in a consideration of the constitutionality of constitutional amendments.

---

[15] The German constitution entrenches as unalterable Art. 1 (Human Dignity) and Art. 20 (Democracy, Rule of Law, Republicanism, Federalism). The Indian constitution provides a different and more difficult method for the reform of provisions relating to the federal structure. The Irish constitution makes no such distinction.

Other Constitutions where the amendment power has express material limits include the Greek (Art. 110), French (Art. 8), Portuguese (Art. 290), Italy, (Art. 139), US (Art. 5) and Turkish (Art. 4) constitutions. These variously entrench fundamental rights, republicanism, or aspects of the federal structure as unamendable. See Denninger, "Constitutional Law Between Statutory Law and Higher Law" in Pizzorusso, ed. *Law Making in a Comparative Perspective* (Berlin: Springer Verlag, 1988).

GERMANY

The German Constitution establishes a rationalised parliamentary system, with a bicameral Parliament, which designates the ceremonial President. The Prime Minister requires the confidence of the Lower House. The Constitution is an enforceable one, and the Federal Constitutional Court of Karlsruhe has often exercised its power to enforce the Constitution.[16]

The 1949 German Constitution reflects the recoiling of a nation from a nightmare. Its very first article identifies human dignity as a fundamental principle which all state authority must respect. Art. 20 declares Germany to be a democratic and social federal state, founded on popular sovereignty, the rule of law and separation of powers. (It also protects the right of resistance.) The drafters of the Constitution regarded these two articles as the most basic blocks of the new constitutional order: although for most purposes the Constitution can be amended by a vote of two-thirds majority in each house of Parliament, the article on Amendment (Art. 79) excludes the possibility of amending the federal nature of the State, or Art. 20 or Art. 1.

In one of its very first cases, the *Southwest State Case*, the Federal Constitutional Court handed down important rulings on how the Constitution was to be interpreted and what it stood for. It emphasised that the Constitution is a coherent document, that is all its provisions must be interpreted as meshing together to form a unified "logical-teleological entity".[17] The Constitution reflects an "objective order of values". The most important of these basic values are the principles of human dignity and democracy (others include the separation of powers, popular sovereignty). Art. 79.3 protects these most important basic values by making Arts. 1 and 20 unamendable.

There is therefore a clear textual authority for substantial limits on the constitution-amending power. Yet one strand of German constitutional thought goes even further. Some judges suggest

---

[16] My inability to read German made me hesitate before including this section, but on balance I felt it better to include a brief summary as regards the important case law in Germany. See generally: D. Currie, *The Constitution of the Federal Republic of Germany*, (Chicago: University of Chicago Press, 1994); D. Kommers, *The Constitutional Jurisprudence of the Federal Constitutional Court* (Durham: Duke University Press, 1997); U. Karpen, *The Constitution of the Federal Republic of Germany* (Baden-Baden, Nomos, 1988); Goetz and Cullen (eds) *Constitutional Policy in Unified Germany*, London: Frank Cass, 1995); Kommers, "The Federal Constitutional Court in the German Political System" 26 (1994) *Comp. Pol. Studies* 470; C. Landfried, "Judicial Policy-Making in Germany" 15 (1992) *West Euro. Politics* 50; M. Herdegen, "Unjust Laws, Human Rights and the German Constitution: Germany's Recent Confrontation with the Past" 32 (1995) *Col. J. Trans. Law* 591; Herdegen, "Natural Law, Constitutional Values and Human Rights" (1998) 19 *Hum. Rts. L. J.* 37; Schlink, "German Constitutional Culture in Transition" 14 (1993) *Cardozo Law Rev.* 711; and the more dated Kommers, *Judicial Politics in West Germany*, California: Sage, 1976).

[17] Kommers, *Jurisprudence of the Federal Constitutional Court*, p. 45.

that there exist a range of "super positive" norms variously referred to as the "natural law" or "justice".[18] These super positive norms bind not only the legislative and the amending power but also the constituent power. Some commentators seem to be of the opinion that there is a dangerous tension between these two conceptions of civil rights in Germany, and that even an application of Art. 79.3 may hide a covert appeal to "natural law" values.[19] Some commentators feel that the positive provisions of Art. 79 resolves any possible tension between these two approaches.[20]

On either approach, German judges accept the doctrine of "unconstitutional constitutional norms".[21] The doctrine is controversial - is it judicial super legislation, or a conscientious application of Art. 79? It is noteworthy that the German Constitution does not explicitly authorise the judiciary to review the legality of constitutional amendments (even though that power is expressly conferred in relation to ordinary statutes). The Federal Constitutional Court claimed this power for itself as necessary for it to protect the objectove order of values on which the Constitution rests.

This is not just an academic debate. Questions on the validity of constitutional amendments have been raised in the Constitutional Court, and in at least one case, the Federal Constitutional Court came to within one vote of invalidating a constitutional amendment.

In 1970, the German Parliament amended Art. 10 of the Constitution (privacy of communications) to allow for interception of communications without informing the object of the surveillance, and without judicial supervision (though with administrative supervision). A number of lawyers and state officials challenged the constitutionality of the Amendment and the statute passed pursuant to it.[22]

---

[18] *Art 117 case*, 3 BVerfGE 225. The judgement refers to Radbruch's notion of natural law as developed after the Second World War: *Der Mensch in Recht* (Gottingen, Vandenhoeck and Ruprecht, 1957).

[19] M. Herdegen, "Unjust Laws, Human Rights and the German Constitution: Germany's Recent Confrontation with the Past" 32 (1995) *Col. J. Trans. Law* 591, 605. Indeed, Herdegen notes that in BVerfGE 84, 90, the Constitutional Court expanded the list of non-amendable precepts in Art. 79.3 to include other “funadamental claims of justice”, see Herdegen, “Natural Law, Constitutional Values and Human Rights” (1998) 19 *Hum. Rts. L. J.* 37, 38.

[20] R. Herzog, "The Hierarchy of Constitutional Norms and its Functions in the Protection of Basic Rights" (1992) 13 *Hum. Rts. L. J.* 90. Prof. Dr. Herzog was President of the Federal Constitutional Court at the time, and so perhaps his dismissal of doctrinal tension was to be expected.

[21] *Southwest State*, 1 BVerfGE 14, Kommers, *Jurisprudence of the Federal Constitutional Court*, p. 62; Bavarian Constitutional Court, 24/4/50, 6 EntBayVerf.

[22] *Klass*, 30 BVerfGE 1 (1970), excerpts in Murphy and Tanenhausen, *Comparative Constitutional Law* (New York: St. Martin's Press, 1977) p. 659. The case went on to the European Court of Human Rights, which rejected the complaint: (1978) 2 E.H.R.R. 214.

The Court divided four to four on the issue of the constitutionality of the Amendment. Under German law, a clear majority of judges must vote against the Government for a measure to be invalidated and thus the amendment survived.

The four judges upholding the law, referred to the necessity to give the Constitution an integrated coherent meaning. In particular, they referred to the notion of *streitbare demokratie*, ("militant democracy")[23]: the Constitution intends that its democratic liberal values should be adequately defended. The democratic state must be protected, and so the Constitution must permit its agents to use reasonable means for that purpose. In this case, the new rules on surveillance were necessary to deal with secret organisations who might plot against the State. The means chosen were proportionate.

These four judges emphasise that Art. 79 only prohibits eliminating the fundamental bases of liberal democracy - it does not forbid altering specifics in particular cases. Provided the principle (basic feature) remains, Art. 79 is not violated. The section in no way infringes the dignity of man., as there are adequate safeguards in the measures.

The "dissenters" disagreed. For them Arts. 1 and 20 form the "cornerstone" of the Constitution. In particular human dignity must be given a wide meaning. It is not merely grossly excessive action which violates human dignity. In combination with Art. 20, it requires that the individual be given adequate access to judicial protection of her rights. According to the dissenters, Art. 79.3 prohibits any measure *affecting* Art. 1 and Art. 20; it does not just prohibit the abolition of those principles.

The amendment clearly affects those provisions. In providing for secret surveillance, it may intrude on the lives not just of spies, but of ordinary persons, all without judicial authorisation. The substituted system of control was not adequately neutral or separate from the legislative and executive. In brief "it is contradictory to abandon inalienable constitutional principles in order to protect the Constitution".[24]

These more liberal judges lost the day, and the Constitutional Court has never again come so close to invalidating an amendment approved by super-majorities in each chamber of the

[23] Karpen, *The Constitution of the Federal Republic of Germany*, p. 15.

[24] Murphy and Tanenhaus, p. 665.

legislator. Yet the power is still asserted (a power which the constitutional text does not explicitly sanction) and the spectre raised, sometimes in quite important areas of public policy.[25]

IRELAND

This issue first arose in Ireland under the 1922 Constitution, since superseded by that of 1937. Certain provisions of the 1922 document must be understood. It was enacted by a Constituent Assembly in a Constitution Act, which contained two appendixes (called "schedules"). The first was the Anglo-Irish Treaty (which brought an end to the Anglo-Irish War), the second was the Irish Free State Constitution.[26] The Act declared that the Anglo-Irish Treaty was to take precedence over the Constitution. The constitution created a classic liberal state (in theory) complete with separation of powers, elections and guarantees of personal liberty. The Westminster Parliamentary model was adopted in its essentials: a Prime Minister (called the "President of the Executive Council") elected by the Lower House of Parliament (Dáil Éireann), with the power to name the Government and dissolve Parliament.

Two amendment procedures were specified (Arts. 47, 50). The normal one involved a bill being passed by Parliament and then being approved by the people in a referendum to become effective as an amendment. However the Constituent Assembly was concerned that technical issues might arise during the infancy of the Constitution, which would require a less cumbersome method of changing the basic law. Accordingly they provided that the Parliament could adopt any amendment, by a simple majority, within an eight year period from the coming into force of the Constitution (Art. 50).

Faced with threats to its authority during the 1920s and 30s, the Government used its parliamentary majority to enact three amendments in particular. Two of these dealt with the amendment provision: one abolished the procedure for amendment by referendum (10th Amdt.), another extended the 8 year period to a 16 year period (16th Amdt.). As a consequence, the

---

[25] See BVerfGE 84, 90 decision of 23 April 1991 on the validity of constitutional amendments adopted pursuant to the Unification Treaty relating to the expropriation of property in the former East Germany. See M. Herdegen, "Unjust Laws, Human Rights and the German Constitution: Germany's Recent Confrontation with the Past" 32 (1995) *Col. J. Trans. Law* 591, 604. In the *Maastricht* decision, the Constitutional Court also noted that the relevant changes introduced pursuant to the Maastricht Union treaty did not violate the core norms protected by Art. 79.3, [1994] 1 CMLR 57.

[26] "Irish Free State" was the official name of the state between 1922 and 1937.

Government believed the 1922 Constitution was not a rigid one, but could always be amended by a simple majority in Parliament, without reference to the people.

With the third amendment, the Government gutted the constitutional safeguards of liberty and fair procedures. The 17th Amendment inserted a new article, Article 2A (Emergency Powers) into the Constitution, which was a "pioneer piece of constitution draftsmanship".[27] It expressly declared that it was to be superior to every succeeding article of the Constitution. This provision could be activated by the Executive, whenever it believed such activation to be expedient (note that there was no requirement that a war, or armed rebellion exist). If activated, it conferred remarkable powers on the Executive. Art. 2A (Emergency Powers) provided for internment without trial (detention at the whim of the executive), and the creation of a military "court" of extraordinary power (the "Constitution Special Powers Tribunal"). This "court" was composed of military officers, who need not have any legal training, appointed by and removed at the will of the Government. The "court" could try persons for any "offence", including for conduct which was not criminal at the time it was committed. The "court" could impose any sentence it choose, notwithstanding statutory provisions, up to and including death, if it thought the death penalty "expedient". It could direct the manner in which such execution should take place. No official inquiry would be permitted regarding such executions. No member of the "court" could be sued or prosecuted for something done while acting as a member of the Tribunal. Furthermore, the provision stated that the sworn statements of certain police officers were legally irrebuttable by cross examination or evidence. Needless to mention the court was not bound by the ordinary rules of evidence, or even the requirement of a public trial (that is, it could exclude members of the public from the court), nor was there a right of appeal. It was the "antithesis of the rule of law."[28] And it was part of the Constitution.

The amendment was attacked by the opposition of the day, led by Eamon DeValera. Specifically, he condemned it as an assault on true Irish nationalists. Shortly afterwards, DeValera came to power, to a large extent with the help of nationalist support - and promptly used the measure to deal with both extreme nationalist and quasi-fascist groups.

In *State (Ryan) v. Lennon*, this measure came under attack during an application to vindicate the right to personal liberty (habeas corpus application).[29] The plaintiff was in the unfortunate

---

[27] Per Kennedy C.J. in *State (Ryan) v. Lennon*, [1935] IR 170, 198.

[28] Per Kennedy C.J. in *State (Ryan) v. Lennon*, [1935] IR 170, 198. Almost as an afterthought, the provision allowed for police officers to detain people for questioning, without charge for 34 days, and allowed police officers to search any premises without a warrant.

[29] [1935] IR 170. Habeas Corpus is a common law remedy for the unlawful deprivation of liberty.

position of having to argue that the article of the constitution was itself invalid. The case went before a three judge Supreme Court, comprising Kennedy C.J., Fitzgibbon and Murnaghan JJ. The majority bluntly reject the claim that Art. 2A (Emergency Powers) was unconstitutional. Dealing with the argument that rights were intended by the Constituent Assembly to be inviolable, Fitzgibbon J. considers that:

> "[The enactors of the Constitution] may have intended to "bind man down from mischief by the chains of the Constitution" but if they did, they defeated their object by handing him [Parliament] the key of the padlock....[30]

The majority's argument is simple in its logic and devastating in its implications. The Constituent Assembly had created a Constitution, and in it had given the Parliament a power to amend it, but specified no explicit restrictions (with the exception that amendments which violated the Anglo-Irish Treaty were invalid, as the Constitution Act which gave force to the Constitution so specified that the Treaty was superior). The amendments were formally valid and there could be no review of their substance. In particular, it was not for the judges to decide that there was a hierarchy of constitutional principles, and it was not for them to decide which constitutional provisions were valid and which not. There is no "spirit embodied in our original constitution which is so sacrosanct and immutable" that contrary amendments are invalid.[31]

However there was one dissenting opinion, that of the Chief Justice, Hugh Kennedy. Kennedy was a nationalist lawyer (one of the drafters of the Constitution) who believed that the moth ridden straitjacket of the British positivist formalist tradition, a straitjacket in which his colleagues were enmeshed, ought to be decisively rejected. Kennedy C.J. notes that the 17th Amendment is "no mere amendment ... but effects a radical alteration of the basic scheme and principles of the Constitution ...."[32] Kennedy C.J. argues that any amendment of the Constitution had to be judged by several substantive standards.

The first was the Treaty which is declared to prevail in case of inconsistency, in the Constitution Act. All three judges agreed on this point, which proved an embarrassment for the Government which was amending the Anglo-Irish Treaty out of constitutional existence. However nothing in the Treaty affected the three amendments involved in this case.

---

[30] p. 234.

[31] p. 236.

[32] p. 200, 202.

Second, the Constituent Assembly specified that some provisions were of special value: separation of powers in Art. 2, the inviolability of liberty in Art. 6, the inviolability of one's residence in Art. 7, free conscience, expression and worship in Arts. 8 and 9 (note that these last two articles do not refer to inviolability). The Constituent Assembly cannot, according to the Chief Justice,[33] be thought to have declared these principles to be inviolable and yet authorised their amendment, so Art. 50 (Parliamentary Amendment) must be subject to an *implicit* restriction as regards these:

> "... the Constituent Assembly cannot be supposed to have in the same breadth declared certain principles to be fundamental and immutable, or conveyed that sense in some other words, as by a declaration of inviolability, and at the same time to have conferred upon the *Oireachtas* [Parliament] power to violate them or to alter them."[34]

However this does not explain why the Constituent Assembly did not simply say that the Amending power did not extend to those provisions.

A third argument centres on the nature of the amending power. According to the Chief Justice, the amending power is something outside of the Constitution itself, that is the Constituent Assembly could have declined to create an amending power, or could have bestowed the amending power on some other body.[35] Further, the Constituent Assembly may grant only a limited power of amendment, if it chooses. Did the amendment power include a completely unfettered power extending even to the amending of the amending power itself? This seems unlikely, because the amending power is itself curtailed (requirement of referendum, procedure of enactment). There is no sense in conferring a limited power of amendment which include the power to remove the limits so carefully put. In this case, if the amending power included the possibility of amending the power itself, this would be so unusual that one would expect to find this explicitly stated.[36] (The majority agreed that such was unusual but that it was not legally impossible.)

The fourth ground specified by Kennedy C.J. is the most interesting. It is a "spectacular assertion of natural law values."[37] The Constitution Act (that is, the act passed by the Constituent

---

[33] See *Golak Nath*, [1967] A.I.R. 2 S.C. 762, 787.

[34] p. 209.

[35] p. 218.

[36] p. 218 - 9.

[37] Kelly, *A Short History of Western Legal Theory*, (Oxford, Clarendon, 1992), p. 425.

Assembly which created the Constitution) referred to God as the source of all authority and Parliament had no power to alter the Constitution Act, as distinct from the Constitution. That is, the Constituent Assembly, exercising its unfettered sovereign power declared that all authority, under the Constitution derives from God. The reference to God was an implicit reference to God's authority, and to the Natural Law, discoverable by reason. This meant that any positive law which violated Natural Law was invalid (or in Kennedy's phrase, unconstitutional, invalid, absolutely null and void and inoperative[38]). The vesting of such arbitrary power to kill in the hands of servants of the executive constituted such a violation and the article was null and void.[39] In particular the provision violated the law of God, as it was an outrageous attempt to deprive judges of the power vested in them by Natural Law to do justice in dealings between citizen and state.

However the Chief Justice's defence of fundamental rights and the rule of law was only a dissenting opinion. Kennedy's was a lone voice crying in a positivistic wilderness, but it was not a cry which went unheeded forever.

In 1937 a new Constitution was adopted, by a popular referendum (thus founding it on a new *Grundnorm* - basic norm - and supplanting the old one). The Constitution is an unusual mixture of different philosophies. Thus for instance, the Preamble refers to the Holy Trinity, the common good, and the duty to assure the dignity and freedom of the individual. Art.44, as originally formulated, referred first to the duty to hold the name of God in reverence, and to the "special position" of the Roman Catholic church,[40] and then proceeds to guarantee freedom of religion, to prohibit religious discrimination, and to prohibit endowments of religion.

The Constitution can only be amended by a bill which is approved by Parliament and then by the people in a referendum (Art. 49). According to the text, the Constitution can be amended whether by way of variation, repeal or addition. In brief, in any way possible.

Under the Constitution judges of the High Court and Supreme Court are authorised to declare invalid any unconstitutional statute. The Constitution also includes several articles on fundamental rights (Arts. 40 - 44), although the Prime Minister in 1937 was of the opinion that these were no more than guidelines for the legislature, and were not legally enforceable.

---

[38] p. 205.

[39] p. 204.

[40] The special position and the recognition of the Jewish Congregation and various Christian churches was removed in 1972.

Until the 1960s, a formalist positivist tradition dominated Irish law. However, three decades after the *Ryan* case, a new breed of judges, who looked for inspiration across the Atlantic to the US Warren court, began to make their mark on Irish public life.[41] The "constitutional revolution" had several basic planks. The judiciary reaffirmed that the Constitution is supreme over all institutions and bodies. It is for the Supreme Court to interpret the Constitution. Judges must interpret the Constitution in the present tense, that is, in the light of today's understanding of justice, and not that of 1937. When interpreting the Constitution, judges must give it a coherent, harmonious interpretation. Further, judges must protect the fundamental rights which the Constitution recognises - but note that the Constitution does not create them. The normative force of fundamental rights derives from their belonging to notions of justice, popularly called natural law, superior to the Constitution itself. The judiciary adopted a dynamic method of interpretation which required that the text be read as a coherent whole in the light of today's values, and that it be so interpreted as to protect personal rights.

Only two examples of their work will be given. In *Ryan v. Attorney General*, the courts held that the provision Art. 40.3.1[42] protected *all* fundamental rights and not just those enumerated in the text of the constitution itself.[43] Judges would decide what rights merited constitutional status as unenumerated rights. This approach was expressly based on the idea that the normative basis for rights lies outside the constitution, and that judges must refer to this basis both in interpreting explicit rights and in determining what rights were implicitly protected, or protected as unenumerated rights.

A dramatic example of this was *M'Gee v. Ireland*.[44] Here the Supreme Court held that it was unconstitutional to prevent a married woman from obtaining contraceptives - it violated her hitherto unknown right to marital privacy. Mr. Justice Brian Walsh issued a resounding statement of the philosophy of the Constitution, endorsing Kennedy's natural law approach:

> "[The fundamental rights provisions] emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural

---

[41] Kelly says they led "nothing less than a revolution in constitutional jurisprudence" in "Fundamental Rights and the Constitution" in Farrell ed., *DeValera's Constitution and Ours*, (Dublin, Gill and MacMillan, 1987) p. 167.

[42] "The State guarantees in its laws to respect and , as far as is practicable, by its laws to defend and vindicate the personal rights of the citizen."

[43] [1965] IR 294.

[44] [1974]IR 284.

rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection."[45]

During the seventies judges stressed the potential of this approach. In particular Walsh J. emphasised that, given this interpretation, the State could not necessarily rely on its emergency powers to violate fundamental rights, even though the text of the Constitution apparently permitted it to do so.[46] Furthermore, presumably fundamental rights also override the provisions of the EC treaties, whose constitutionality is protected by Art. 29. If taken to its ultimate conclusion this doctrine means that all aliens are entitled to exercise all fundamental rights, something not made clear in the Constitution.[47] However the most dramatic and controversial assertion of natural law values in recent times only took place in 1993.

In 1992 the Supreme Court upheld a limited right to abortion, in the circumstance where there was a serious threat to the life of the pregnant woman.[48] Also in 1992 the people approved two amendments concerning abortion; one guaranteed the right to travel to receive services lawfully available abroad, the other guaranteed the right to receive information about such services.

In 1993, a Mr. Roderick O'Hanlon published an article "Natural Rights and the Constitution" where he made the following argument.[49] The Constitution is premised on natural law values which are superior to any positive law. Furthermore this natural law is a religious and not a secular concept. This is clear (according to O'Hanlon) from the myriad references to God and religion, from the opening words of the Preamble (the "Holy Trinity") to the final words of the text ("For the Glory of God"). The Natural Law must be interpreted as protecting fundamental rights, and chief amongst these is the right to life, including the right to life of the unborn. The constitutional amendments infringed this right, and in the light of the now redeemed opinion of

---

[45] P. 310.

[46] Art. 28.3.3. says that, in times of emergency, no statute which is expressed to be for the purpose of resolving the crisis may be declared invalid. See Walsh, "The Constitution and Constitutional Rights" in Farrell ed., *DeValera's Constitution and Ours*, (Dublin, Gill and MacMillan, 1987) p. 89 - 91. He says, that an utterly evil law cannot be upheld under Art. 28.3.3, and should be invalidated by judges on the basis, not of any particular constitutional provision, but on the basis of the natural law. He expressly endorses the reasoning of Kennedy C.J. in the *Ryan* case. He notes that there is support for this attitude in *In re Article 26 and the Emergency Powers Bill Case*, [1977] I.R. 159.

[47] See Barrington J. in *Finn v. Att. Gen*., [1983] I.R. 154; Hamilton P. in *Kennedy v. Ireland*, [1987] I.R. 587.

[48] *Attorney General v. X*. [1992] 1 IR 1. The Supreme Court rejected the Attorney's request for an injunction to prevent a 14 year old, suicidally inclined rape victim from leaving the state to have an abortion.

[49] O'Hanlon, R., "Natural Rights and the Constitution" (1993) *ILT* 8; O'Hanlon, R., "The Judiciary and the Moral Law" (1993) *ILT* 129.

Kennedy C.J., they might be considered to be invalid amendments. Incidentally Mr. O'Hanlon is no academic idler - until recently he was a judge of the High Court. O'Hanlon J.'s thesis provoked substantial (unfavourable) academic comment,[50] and was eventually rejected by the Supreme Court in the important *Abortion Information* case.

The case arose from the reaction to the *X* decision. Following that decision the people approved the Fourteenth Amendment in a referendum, allowing for freedom to receive and impart information relating to services lawfully available outside the State (i.e. abortions in Britain). Parliament passed the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill to implement the Fourteenth Amendment.[51]

When the Bill was passed, President Robinson, after consulting with senior constitutional officers, decided to refer the Bill to the Supreme Court under Art. 26 of the Constitution for a determination of its validity. The Court appointed two sets of lawyers to argue against the Bill, one set invoking the right to life of the pregnant woman, one set invoking the right to life of the foetus. The Court handed down a single opinion (as required by Art. 26), read by Hamilton C.J. confirming the Bill's validity, and so precluding it from ever being challenged again in a court action.[52] One important element of this decision is the treatment of "natural law"; another important element is the role of constitutional interpretation.

---

[50] Murphy, "Democracy, Natural Law and the Irish Constitution"(1993) *ILT* 81; Clarke, "The Constitution and Natural Law"(1993) *ILT* 177. See the excellent discussion in Kelly, Hogan and Whyte, *The Irish Constitution*, (Dublin, Butterworths, 1994) p. 671 *et seq*.

[51] The Bill does not refer to abortion services within the State which (except where the life of the pregnant woman is endangered) are still unlawful and unconstitutional. The Bill refers to such information about abortion services outside the State as "Act information". Under sections 3 and 4, provided certain conditions are met, one may publish abortion services information, except by a public notice posted in a public place or by unsolicited distribution of publications. Such information may only refer to services which are lawfully available in the foreign State, must be "truthful and objective", and must not advocate abortion.

Section 5 of the Bill deals with people who provide pregnancy counselling (i.e. professional counsellors). Such people may not advocate an abortion. They may only give information about abortion services if the above conditions are met, and if they provide information about all the options, in addition to abortion, available to a pregnant woman. Sections 6 and 7 require such counsellors not to have any financial or other personal interest in abortion services, nor to receive any benefit from persons providing abortion services, nor to receive any benefit from pregnant women regarding the provision of abortion information. Section 8 precludes such counsellors from making an appointment or any other arrangement for a pregnant woman with a foreign abortion service. They may however turn medical records over to the pregnant woman. Persons who violate the provisions face a fine of up to 1,500 pounds.

The Bill does not explicitly deal with certain matters, most notably with whether the parents of a minor, or the husband of a pregnant woman, have any right to be informed about her activities and request for abortion information. Also the duties of pregnancy counsellors, doctors, etc. are left unclear.

[52] *Abortion Information case*, [1995] 2 I.L.R.M. 81. Page references are to this report.

Counsel arguing the position of the foetus tried to argue that the Fourteenth Amendment on which the bill was based was itself unconstitutional. The argument ran as follows: the Constitution is founded on the natural law; anything which assists in an abortion violates the natural law; the provision of abortion information is such a violation and so cannot be rendered constitutional by a referendum. In making this argument the lawyers were relying on some of the more extreme statements made by Irish lawyers about the natural law underpinnings of the Constitution.[53]

The Supreme Court dismisses this claim: "The court does not accept this argument" (p. 102). This argument assumes, wrongly, that the natural law is the foundational law of the State. Art. 5 of the Constitution identifies Ireland as a "sovereign, independent democratic state". Art. 6 of the Constitution says that all powers of government derives "under God, from the people, whose right it is ... to decide all questions of national policy ....". The people are the supreme authority and the Constitution is their creature.[54] Those powers of government may only be exercised in the manner proscribed by the Constitution which creates those powers, and "limits, confines and restricts" them (p. 103). The Constitution is supreme, and any measure which violates it is invalid and unlawful (p. 104). Each organ of government is required to act "subject to the provisions of this Constitution", and, in addition, judges swear an oath to uphold the Constitution. There is no power to review the substance of a constitutional amendment, provided it is carried out in a procedurally correct manner.[55]

Counsel's argument is based on what the Court identifies as a misreading of several cases. The cases which refer to unenumerated personal rights and extra-textual values do not recognise the natural law as superior to the Constitution (p. 105 -107).[56] In particular, the Court reiterates what Walsh J. said in *M'Gee*, that in a "pluralist society", courts cannot choose between the philosophies of different theologians and different denominations (p. 107). What counsel sees as reference to the superiority of natural law is actually the interpretation of the Constitution which involves reference to extra-textual values. In particular the unenumerated personal rights cases do not establish the superiority of natural law. Rather in each case the court had:

---

[53] This extreme position can be found variously in *State (Ryan) v. Lennon*, [1935] I.R. 170, per Kennedy C.J. diss.; Grogan, "The Constitution and the Natural Law" (1954) 8 *Christus Rex* 201; Walsh, "The Constitution and Constitutional Rights" in Litton, ed. *The Constitution of Ireland*; O'Hanlon, "Natural Rights and the Irish Constitution", (1993) *ILT* 8; O'Hanlon, "The Judiciary and the Moral Law", (1993) ILT 129.

[54] Referring to Budd J. in *Byrne v. Ireland*, [1972] I.R. 241, 295.

[55] Confirming earlier High Court authority: *Finn*, [1983] I.R. 154.

[56] *Ryan v. Att. Gen.*, [1965] I.R. 294; *M'Gee v. Ireland*, [1974] I.R. 284; *State (Healy) v. Donoghue*, [1976] I.R. 325; the *X case*, [1992] 1 I.R. 1.

" ... satisfied itself that such personal right was one which could be reasonably implied from and was guaranteed by the provisions of the Constitution, *interpreted in accordance with its ideas of prudence, justice and charity*." (p. 107, italics added)

The Fourteenth Amendment is valid, and must be interpreted in accord with the Court's ideas of prudence, justice and charity.

These comments on interpretation and the natural law are of the greatest importance. First, they emphasise that it is legitimate for courts to refer to extra-textual values to interpret the Constitution. The courts must pursue a synthesis between the constitutional text and fundamental values (p. 107). Second, these fundamental values do not override the Constitution. That would fail to do justice to the sovereignty of the people, who are the supreme authority. To put it in more theoretical terms, the natural law argument sought to vindicate natural rights, such as the right to life of the unborn, and put them on a higher plane than procedural rights, expressed through political participation. The Supreme Court rejects this position, and rather tries to find a synthesis which does justice both to popular sovereignty and fundamental rights.[57]

The Irish courts - unlike the German Constitutional Court - rejected the power to review the constitutionality of procedurally correct amendments. Yet it still endorses the interpretative technique which makes the assertion of that power quite plausible - that the open-ended guarantees of rights must be interpreted according to the (judicially announced) evolving standards of justice.

INDIA

"Judicial restraint" and "deference" are not terms that one can easily use when discussing the Indian case law on this topic. The Indian example is even more interesting than the German and Irish ones, primarily because Indian judges, rightly regarded as the most activist in the world, have struck down several constitutional amendments.

The 1950 Indian Constitution creates a federal structure, guarantees rights to equality and freedom, establishes judicial review of legislation, and sets up a national Parliament which elects the Prime Minister. Again, this a is a modified Westminster model, with a President exercising the roles of the monarch in the UK system.

[57] This argument relies on Habermas' *Between Facts and Norms*, where he also argues for such a synthesis, rather than a straightforward superiority of either the rights of the moderns or the ancients. See also Rawls, *Political Liberalism*.

Three amendment procedures exist in the Constitution. Certain articles foresee amendment by a simple legislative act. These relate to social problems where a flexible approach was thought necessary. Second, amendments affecting the federal structure require that a bill be approved by the national parliament by a vote which represents both an absolute majority of members and a two-thirds majority of those present and voting, plus ratification by no less than one half of the state legislatures. For all other provisions the procedure required is the same as the one just mentioned save that there is no need for ratification by any state legislature (Art. 368 (Amendment)).

Constitutional politics in India has been marked by clashes between the Supreme Court and the political organs. The Court early established that its fundamental task was to "safeguard the fundamental rights and liberties of the people" and this it has, at times aggressively, done.[58] Thus, for instance, the Supreme Court has held that a constitutional amendment saying that Parliament shall determine the level of compensation in cases of confiscation of property, did not mean that Parliament had *carte blanche*: "compensation" has the inherent meaning of *just* payment.

Indeed, many of the most bitter disputes in India centre on social and economic reform, and especially, the ownership of property. In 1951, 1954, 1964, and 1971 Parliament passed amendments which reversed court decisions relating to the regulation and confiscation of land. The 17th Amendment (1964), extended the power of Parliament to abolish property rights. It also inserted certain land reform measures into an appendix to the Constitution, the Ninth Schedule, to guarantee their constitutionality.

In *Golak Nath's* case this constitutional amendment was challenged.[59] Five judges ruled that they could not decide on the constitutionality of constitutional amendments. However eleven judges were sitting on the court and six of them ruled that Art. 368 (Amendment) did not permit the abridgement of rights, even by an amendment.[60] The majority relied on two main reasons for saying that Art. 368 (Amendment), which does not refer to any exceptions to the amending power, did in fact have this exception. First, the rights and freedoms are given an especially prominent place, reflecting the fact that the people have reserved these rights to themselves: Art. 13 (Protection of rights) expressly declares invalid any law which violates them. The priority of these rights is something that the Constitution *recognises*; it does not grant the rights. It is for this reason that no law can abridge fundamental rights, even if every one in the Parliament supports

[58] Cassels, "Judicial Activism and Public Interest Litigation in India" 37 *Am. J. Comp. Law* 495 (1989).

[59] *Golak Nath v. Punjab*, A.I.R. [1967] S.C. 1643.

[60] This overturned *Sankari Prasad Singh Deo v. India*, A.I.R. [1952] S.C. 89.

it. Second, Art. 368 (Amendment) does not create any new power for the Parliament: it simply recognises a procedure whereby an ordinary law (albeit one passed with specified majorities) may amend the Constitution. The power so regulated is the legislative power, and, as just mentioned, Art. 13 (Protection of rights) prohibits the enactment of laws which violate rights. Accordingly, a law passed according to the amendment procedure is still a law and subject to Art. 13. According to the Supreme Court, only a new Constituent Assembly can abridge fundamental rights. (The requirement of a new Constituent Assembly is without any foundation in the text of the Constitution, and it is difficult to see how it can constitutionally be done.)

The majority declared that their decision was to have prospective effect only, and so the amendments in this case were accepted as enforceable. (This was the first Indian case to accept the US notion of prospective overruling).

The minority condemned as fictitious the notion that Art. 368 merely recognised a special legislative procedure, but created no power to amend the Constitution. Rather Art. 368 (Amendment) created a constitution amending power, a power to create constitutional, not merely statutory norms.

In 1971 Indira Gandhi, seeking a mandate for reform, won a general election and her Congress (I) party received two-thirds of the seats of Parliament, enough to enact amendments to the Constitution. Parliament enacted the 24th, 25th, 26th, and 29th Amendments, to put an end to meddlesome judges and awkward property owners. The 24th made the following changes: it introduced Art. 13 clause 4, which stated that nothing in Art. 13 (Protection of Rights) applied to the amending power under Art. 368 (Amendment); further Art. 368 (Amendment) (3) was changed so as to render Art. 13 (Protection of rights) inapplicable to Art. 368; third, the amendment provided that Parliament may exercise the constituent power and could now amend the any part of the Constitution, whether by way of "addition, variation or repeal". The 25th made more changes to the property provisions; it provided that statute should determine the principles governing the amounts (not "compensation") payable upon confiscation, and that no law should be challenged on the grounds that the amount was inadequate. Laws giving effect to Art. 39 (b) or (c) (Directive Principles) were deemed to be constitutional even if they transgressed Art. 14 (equality), Art. 19 (freedoms), or Art. 31 (property). It further declared that no law, which declares itself to be implementing the directive principles of social policy in Art. 39 (b) or (c) could have its constitutionality questioned on the grounds that it did not promote those policies.[61]

[61] This was passed to overturn the decision in *R.C.Cooper v. India*, [1970] A.I.R.S.C. 564.

The constitutionality of these provisions was challenged in the case of *Kesavananda v. State of Kerala*.[62] The first issue was whether Parliament could amend the fundamental rights provisions. The 13 judges held that *Golak Nath* was wrongly decided: Art. 368 (Amendment) permitted the amendment of any part of the Constitution. Accordingly the 24th Amendment was valid. However this was a case of one step back, and two steps forward.

Seven of the judges (a bare majority) held that Art. 368 (Amendment) did include an implied limitation on the Amendment power: Parliament could only amend the Constitution, it could not abolish its essential features. The majority judges relied on several arguments.[63] First, "amend" does not mean to destroy, but merely to alter non-essential elements. Second some argued that the Preamble and other provisions indicated that certain principles were especially important: constitutional supremacy, democratic republican government, secularism, separation of powers, federalism, welfare state, national unity, individual freedom were the values so identified, though the judges did not agree on the exact list. Sikri C.J. emphasised that these principles were founded on the dignity and freedom of the individual. These principles are immutable: the sovereign people would not permit them to be altered, and if they did, then they would have expressly said so.[64]

Six judges dissented. They argued that all parts of the Constitution were of the same status, and none could be given such a priority over any other. The amending power clearly encompassed the repeal of any provision, even a basic one. One judge observed that Parliament, exercising its constituent power was the appropriate protector of fundamental rights.[65]

One member of the seven judge majority, Khanna J., held that the right to property was not part of the basic structure and therefore the amendments restricting property rights were valid. However he agreed that the provision of the 25th Amendment purporting to oust review by the court over whether a law, expressed to be for the purpose of effectuating the directive policies (Art. 31 (b), (c)), was in fact for those purposes, was objectionable. According to the seven judges this would allow Parliament to do anything, simply by invoking those purposes, and that

---

[62] A.I.R. [1973] S.C. 1461. Incidentally the case is 700 pages long! See Surendra Malik (ed.) *The Fundamental Rights Case: The Critics Speak!* (Lucknow, 1975); Rajeev Dhavan, *The Supreme Court of India and Parliamentary Sovereignty*, (New Delhi, 1976).

[63] Incidentally, Sikri C.J. referred approvingly to Kennedy's speech in *Ryan* para. 358.

[64] As far as the attempt to change "compensation" to "amount" was concerned, the Supreme Court allowed this - but insisted that the amount could not be set arbitrarily.

[65] Some of the judges relied on the majority judgements in the *Ryan* case: para. 936, 937, 1012, 1304.

would abolish judicial review and the protection of basic rights. That section was accordingly unconstitutional.

Mrs. Gandhi expressed her annoyance at this, by refusing to appoint the most senior judge as the Chief Justice, upon the Chief Justice's retirement. Rather, she ignored this constitutional custom and appointed the most senior member of the six judges who opposed the essential features doctrine.[66] However, more was to come.

In June 1975, a High Court declared that Mrs. Gandhi's election in 1971 had been invalid (because she had engaged in corrupt practices) and that she was barred from election for six years. Gandhi's reaction was prompt and remarkable: the Prime Minister of India staged a *coup d'état*.

She advised the President to issue a Proclamation of Emergency arising from internal disturbances (there had been some violence in certain areas). The rights to life, liberty and expression were suspended. Tens of thousands were interned without trial, including members of Parliament. The tamed Parliament then enacted two rather extraordinary amendments. The 38th provided that the decision of the President to issue a Proclamation of Emergency was unreviewable by any court. The 39th Amendment retrospectively altered the laws under which Gandhi had been convicted of election offences; and it also prohibited any court from adjudicating any issue on the elections of the President, Vice-President, Speaker of the House and the Prime Minister, even if such a matter was already pending before the court at the time of the amendment. One must appreciate the tact of Mrs. Gandhi in not limiting the exception just to the office of Prime Minister!

At this stage Mrs. Gandhi's appeal went before the Supreme Court. The court was composed of five judges. Four of these, including the Chief Justice had voted against the essential features doctrine, and the fifth was Khanna J.[67] The Chief Justice had been appointed as a "committed" judge, i.e. one who would promote national policies. Given the opinions expressed by the judges in the earlier case, Mrs. Gandhi must have felt confident.

---

[66] The judge was Ray J., who had been the only judge to dissent when the Supreme Court invalidated an Executive order depriving Indian princes of certain privileges: *Madhav Rao Scinda v. India*, A.I.R. 1971 S.C. 530. Gandhi used the Executive Order, when Parliament failed, by one vote *to pass a constitutional amendment which would do the same*. See R. Dhavan, and A. Jacob, *Selection and Appointment of Supreme Court Judges* (Bombay, 1978).

[67] *Indra Nehru Gandhi v. Raj Narain*, A.I.R. [1975] S.C. 1590. Incidentally Khanna J. was the only judge to dissent in the case upholding the suspension of Habeas Corpus during the Emergency: *A.D.M. Jubbalpore v. Shiv Kant Shukla*, A.I.R. [1976] S.C. 1207.

The judges upheld the retrospective alteration of the election laws - Mrs. Gandhi had been validly elected, in law. However, the Court declared that the 39th amendment, in trying to preclude judicial review, violated three essential features of the constitutional system. Without judicial review of the fairness and legality of elections, fair democratic elections would be a myth. Further, equality was violated by setting a special status for four specified constitutional officers. Third, the invasion of the judicial power, particularly in a case already pending before the courts, violated the separation of powers. Therefore that section was invalid.

This was the most significant defiant act of the judiciary during the Emergency, which lasted until 1977. For a time Gandhi considered implementing what would have been a new constitution with a French style "elected monarch", but did not. Rather, she retaliated with the 42nd Amendment which, indeed, may be described as the constitutional amendment to end all constitutions. As well as extending the power of the Executive, the Amendment's 59 sections launched a campaign of war against the judiciary. In particular it declared Parliament's constituent power to be absolute, declared that legislation implementing directive policies were superior to fundamental rights, and restricted the courts' range of remedies and actions. The Amendment also required that statutes could only be invalidated if five out of seven Supreme Court judges voted to do so.[68] The Emergency Parliament inserted 101 statutes into the 9th Schedule to the Constitution, thus protecting their constitutionality (The 9th Schedule now includes about 200 statutes). Also Parliament extended its term by a year.[69]

As surely as Gandhi retaliated against the courts, retaliation was visited upon her. The electorate terminated its mandate for the Congress (I) party in the 1977 elections. The Janata Party succeeded Congress (I) after its humiliating defeat at the hands of the electorate. The JP proceeded to restore India to normalcy, with the 43rd and 44th Amendments. In particular, it greatly reduced the powers available to the Government during an Emergency. However it was only partially able to reverse the 42nd Amendment, because the Upper House of Parliament, one-third of whose members are elected every two years, contained enough Gandhi supporters to block some of the reforms. In particular the primacy of the Directive Principles, and the absolute nature of the constituent power remained untouched by the reformers. Then in late 1979 Mrs. Gandhi returned to power.

---

[68] See R. Dhavan, *The Amendment: Conspiracy or Revolution*, (Allahabad, 1978).

[69] See Nayantara Sahgal, *Indira Gandhi's Emergence and Style*, (New Delhi, 1978), Mary Carras, *Indira Gandhi: In the Crucible of Leadership*, (Boston, 1979); Baxi, *The Indian Supreme Court and Politics*, (Lucknow, 1980); G. Mirchandani, *Subverting the Constitution*, (Columbia, Mo., 1977); Kuldip Nayar, *The Judgement: Inside Story of the emergency in India*, (New Delhi, 1977); David Selbourne, *An Eye to India: The Unmasking of Tyranny*, (New York, 1977); P. Bhushan, *The Case that Shook India*, (New Delhi, 1978).

Four months later, the Supreme Court reasserted itself. In *Minevra Mills*, the Supreme Court declared invalid the two offensive provisions of the forty-second amendment. Specifically, it held that constitutional amendments could be reviewed and that the courts could examine legislation to determine whether they furthered the Directive Principles.[70]

> "Since the Constitution had conferred a limited amending power on Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed." (p. 1798)

This is the most interesting of the cases, for the JP government had lacked the formal possibility to change this amendment, and Gandhi had no wish to change it. However the Supreme Court appreciated that it had both the formal doctrine and the effective legitimacy to, return (most of) the Indian constitution to the Indian people.

There are two consequences of this saga. It is clear that the Indian judiciary, because of the sustained attacks on it, was unduly politicised in a party political sense during the late seventies, and this has had a detrimental effect on the judiciary.[71] Second, the Supreme Court, sensing the popular approval of its 1980 decision, has felt encouraged in its search to reassert its role in Indian political life, and to redeem its record.[72] Irrespective of the essential features doctrine, this sense of legitimacy has led the court into some quite remarkable forays of activity, under the guise of Public Interest Litigation.[73]

---

[70] *Minevra Mills v. India*, A.I.R. [1980] S.C. 1789. The 36th Amendment to the Constitution was partially invalidated in *Sambamurthy v. Andhra Pradesh*, A.I.R. [1987] S.C. 663. The amendment purported to allow a state government to alter a decision of a tribunal.

[71] See Seervai.

[72] Bhagwati describes this as providing a "new historical basis for the legitimation of judicial power", "Judicial Activism and Public Interest Litigation" 568. For further, see R. Dhavan, et al., *Judges and the Judicial Power*, (Bombay, 1985).

[73] There are several elements to this renewed Indian judicial activism. The first is the expansive reading given to certain constitutional provisions, notably Art. 14 (Equality) and Art. 21 (Life and Liberty). The Supreme Court of India has transformed these from simple guarantees of life, liberty and equality into a wide ranging guarantee of fairness which includes the right to live with "basic human dignity."[73] In this manner the Court has circumvented the express judicial unenforceability of Part IV, Directive Principles of State Policy. The second element involves loosening the rules on standing (*locus standii*), so that any member of a social action group may directly petition the Supreme Court, on behalf of the constitutional rights of someone else, if the alleged victim is, for reasons of poverty or ill education, incapable of petitioning the court himself (compare with *SPUC* v. *Cogan*, [1989] I.R. 734). Furthermore the petition to the court need not be a formal one : a simple letter will suffice, *Kadra Pahadiya v. State of Bihar*, [1981] A.I.R. 939 (S.C.); *Judicial Appointments and Transfer Case*, [1982] A.I.R. 149 (S.C.). Third, the Court has renounced key elements of the adversarial system in these cases: it sets up its own investigative

COMMENT

What lessons can be drawn from these three examples?[74] First, the mere absence of a grant of power does not preclude a court deciding that it has that power. Neither the German nor the Indian Constitution authorises explicitly the courts to control the constitution amending power's

---

commissions, for instance, *Mukti Mocha v. India*, [1984] A.I.R. 802 S.C. Fourth the Court has developed new remedies to solve these problems. In *Mukti Mocha*, the Court issued orders ending the debt bondage system (def facto slavery) and *rehabilitating* persons whose lives had been blighted by it. In *Hussainara Khatoon v. Bihar*, the court reformed Bihar's pre-trial detention system, [1979] A.I.R. 1360 S.C. In *Khatri v. Bihar*, the court ordered that the state provide training for persons who had been blinded, [1981] A.I.R. 928 S.C. The Court reformed the system for detaining women in *Sheela Barse v. Maharashtra*, [1983] A.I.R. 378 S.C.

See also *Francis Mullin v. Administrator, Delhi*, (1981) 2 S.C.R. 516, A.I.R. [1981] S.C. 746. On the right to a livelihood see *Tellis v. Bombay Corpn.* A.I.R. [1986] S.C. 180. On the right against pollution see *Rural Litigation and Entitlement v. Uttar Pradesh*, A.I.R. [1985] S.C. 652. On the right against industrial hazards and pollution, see *M.C. Mehta v. India*, [1987] A.I.R. 965.

For academic commentary see: Agarwala, "The Legal Philosophy of Justice P.N. Bhagwati" (1987) *Ind. Bar. Rev.* 136; Baar, C., "Social Action Litigation in India: The Operation and Limitations of the World's Most Active Judiciary." (1990) 19 *Pol. St. J.* 140; Bhagwati, "Judicial Activism and Public Interest Litigation." (1985) 23 *Col. J. Tr. L.* 561; Cassels, "Judicial Activism and Public Interest Litigation in India." (1989) 37 *Am. J. Comp. L.* 495; Sorabjee, S., "Equality in the United States and India", in Henkin and Rosenthal, eds., *Constitutionalism and Rights* (New York, Col. U.P., 1990).

[74] See also W. Murphy, "Consent and Constitutional Change" in O'Reilly ed., *Human Rights and Constitutional Law*, (Round Hall, Dublin, 1992). I would just like to note that in certain other states courts have struck down constitutional amendments as being unconstitutional. These include Pakistan, Bangladesh, (*On the Constitutionality of the 8th Amendment*, (1990) Supreme Court) and California.

In the Californian case of *Raven v. Deukemejian*, 801 P.2d 1077 (1990) the Supreme Court invalidated part of a constitutional amendment, which enacted wide-ranging reforms to the criminal justice system.[74] There are two methods for amending the Californian Constitution: initiative and revision. Initiative involves simply a consultation of he people, revision involves a more complicated and formalised process, requiring a constitutional convention. The Constitution explicitly prohibits initiative proposals which cover more than one subject matter. Further the Supreme Court of California has held that an amendment by initiative must not affect the essential features of the Californian constitution.

In this case the initiative amendment contained 31 sections and made 35 changes to the Constitution, Code of Civil Procedure, Evidence Code and Penal Code. Nevertheless the Court held that since all of the changes were related to criminal procedure there was no violation of the one subject rule (one judge dissented from this finding). The Court also held that most of the amendments did not alter any essential features (even though they did such things as create a right of the prosecution to a speedy trial, allow the introduction of hearsay evidence in preliminary hearings, imposed duties of disclosure on criminal defendants, broadened the use of the death penalty, extending the death penalty to cover aiding and abetting certain crimes, permitted a defendant to be convicted on the basis of a confession alone, eliminated the requirement that the prosecution prove an intent to commit all the elements of a crime). However one of the amendments provided that the Supreme Court of California should not give a more extensive interpretation to certain due process rights than that given by the federal Supreme Court to federal due process provisions. According to the Court, this amounted to a transfer of the judicial interpretative power from the Californian to the federal courts, and that was so an essential change that it could not be effected by initiative (p. 1088 - 90).

exercise. Yet judges have - by their interpretation of the Constitution - claimed that power for themselves. Indeed the "logic" of basic rights seems to demand no less,[75] even though this then conflicts with the equally basic rights of political participation rights.[76] The message for British lawyers is clear: the extent to which the Human Rights Act controls the power of the judiciary will depend not just on its text, but also the interpretation given to it by the judges.

Second, one should note that a traditional - apparently modest - method of interpretation does not necessarily lead to modest results. The *Golak Nath* majority relied on a semantic argument that Art. 368 did not create an amendment power. This was reasoning in the classic semantic formalist sense. The *Kesavananda* judges, German judges and Kennedy C.J. used the notion of a coherent interpretation, and more strongly emphasised the normative (i.e. moral) nature of their interpretation. Whether one agrees or disagrees with the results reached, one must acknowledge that a traditional method of interpretation did not act as a bar on judicial activism.

In any event, the language of basic rights is such that traditional "deferential" modes of interpretation rapidly become unfashionable, and are replaced by methods oriented to coherence and values, thrusting judges into the arena of policy. British judges are of course not unaware of this; indeed some seem to positively welcome it.[77]

The question which British lawyers must attempt to answer, as civil liberties become expressly acknowledged within Britain's internal legal order, is to what extent is this a new constitutional dispensation, and what to make of the binds that it places on judicial power to protect civil rights? Are those binds consonant with the expressions of human rights and dignity found in the same document? A judicial decision saying 'no' might seem shocking, but it would not be as startling as some of the assertions of judicial power described in this article, now would it be without precedent.[78]

---

[75]Compare D. Beyleveld, "The Concept of a Human Right and Incorporation of the European Convention on Human Rights" (1995) *Public Law* 577, 597 and his comments on the uncabinable nature of rights.

[76] An important attempt by a discourse theorist to get beyond this paradox is: Nino "A Philosophical Reconstruction of Judicial Review" 14 (1993) *Cardozo Law Rev.* 798.

[77] Lord Irvine of Lairg, "The Development of Human Rights in Britain under an Incorporated Convention on Human Rights" (1998) *Public Law* 221, 228-9.

[78] *R. v. Secretary of State for Transport, (Factortame)*, [1991] 3 All. E.R. 769. Indeed without a similar judicial assertion of power, the Human Rights Act may remain no more than "a mouse that roared" - Lord Lester of Herne Hill, "The Mouse that Roared: The Human Rights Bill 1995" (1995) *Pub. Law* 198, speaking about an earlier but similar measure. See also: Marshall, G. "Interpreting Interpretation in the Human Rights Bill" (1998) *Public Law* 167

The outlines of such a judicial departure have indeed already been powerfully articulated: Sir John Laws, "Law and Democracy" (1995) *Public Law* 72. A more modest hint is found in Lord Woolf of Barnes "Droit Public - English Style" (1995) *Public Law* 57, 69.

See K. Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 *MLR* 79 for the most recent discussion of the Human Rights Act.